group will take their own actions to recover the debts. As the CKL group is unable to service the debts or repay the principal this will result in immediate liquidation/bankruptcy of the whole CKL group.

In total, at least 100 companies are involved and the following adverse impact on the economies of Malaysia and Singapore may take place:

(a) Stock Exchange:
The listed companies within the CKL group may be suspended. Listed companies controlled by the Chongs' business partners and others may also be affected, probably causing panic-selling by the investor public. The situation could well deteriorate and affect both the stock exchanges in Malaysia and Singapore.

(b) Banking system/economy:
Properties held as securities may have to be sold off at forced sale values while quoted shares held cannot be disposed off due to the suspensions. Large losses could therefore accrue to the lenders and cause adverse publicity to the banking system and the Malaysian and Singapore economies.

(c) Stock brokers:
When quoted shares held as collateral cannot be disposed of through the stock exchanges, the brokers will encounter liquidity problems, and some brokers may face liquidation particularly those which are more involved with the CKL group. Again, the adverse publicity may hurt the economies on both sides of the causeway.

Not everybody who quotes the maxim 'fiat justitia' (let justice be done) is aware that it is only half the quotation. The other half is 'ruat coelum' (though the heavens may fall). If the skies are to open over the Malaysian public as a result of the activities of participants in the judicial process, then the sooner the public gets to hear about it the better. Emphatically this case was one of which it was in the public interest to have heard in the open.

Mercifully the doomsday predictions for the Landmarks shares do not appear to have materialised so far. They have, as counsel for Landmarks readily concedes, gone up in price since the dismissal of the application. Why that should be so, is of course another story.

It only remains to order that the plaintiffs will pay the defendants the costs of today's proceedings also.

Order accordingly.

Solicitors: *Azman, Davidson & Co; Shearn Delamore & Co; Wang Kuo Shing & Co.*

Reported by *Wong Kim Fatt*

Standard Chartered Bank v Konwah Enterprise Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO D3-23-1294-87
MOKHTAR SIDIN JC
12 MAY 1989

Banking – Overdraft facilities – First legal charge on land – Guarantee – Land sold by chargors with consent of chargee – Proceeds of sale paid to account of borrowers – Fair market value of land – Whether chargors agents of bank – Duty of care of chargee

Civil Procedure – Summary judgment – Appeal against decision of registrar – Whether any triable issue

The plaintiff as banker had extended to the first defendant overdraft banking facilities secured by a first legal charge created over a piece of land belonging to the second and third defendants and guaranteed by the second to seventh defendants up to the limit of $400,000. The plaintiff demanded payment when the overdraft facilities advanced stood at about $360,000. The second and third defendants, as chargors, with the consent of the plaintiff, sold the land by private treaty at the sum of $280,000 which was paid to the plaintiff to reduce the overdraft account of the first defendant. The plaintiff's claim against the first defendant was accordingly amended and reduced by $280,000. The learned senior assistant registrar gave summary judgment for the plaintiff for the amended sum.

Being dissatisfied with that decision, the second, third, fourth, fifth and sixth defendants appealed to the judge in chambers. On the hearing of the appeal, it was contended on behalf of the defendants that the decision of the senior assistant registrar was wrong and should be set aside and the appeal allowed on the following grounds: (a) the amount claimed and stated to be owing by the defendants to the plaintiff had not been proved at all either by the affidavit filed or by any certificate of indebtedness; and (b) it was the contention of the fourth, fifth and sixth defendants that the plaintiff had failed to discharge the duty of care which it owed to them, ie the fourth, fifth and sixth defendants, to obtain the true market value of the land at the time when the plaintiff had agreed to the sale of the land by the chargors, ie the second and third defendants.

Held, dismissing the appeal with costs:

(1) The learned judicial commissioner is of the opinion that the sale of the land at $280,000 reflects the fair, or substantially the fair, market value of the land at the material time. The sale was done by the second and third defendants who are the owners and chargors. It was the second and third defendants who negotiated with the third party for the sale and purchase of the land by private treaty, as opposed to a sale by public auction under the provisions of ss 253 to 269 of the National Land Code 1965. The *Standard Chartered Bank* case[1] does not assist the defendants. The second and third defendants are not the agents of the plaintiff, which is not responsible for their act.

(2) The amount due and payable at the time of the hearing of the O 14 application before the senior assistant registrar was as stated in the affidavit of Lim Jian Hoo affirmed on 14 July 1987. The defendants failed to adduce any evidence to show that the amount stated is wrong in order to raise a triable issue. The learned judicial commissioner is satisfied that the land was sold at $280,000 and this sum had been taken into account by the plaintiff.

(3) Section 94 of the Contracts Act 1950 is not applicable in this case for the simple reason that the sale of the land was not carried out by the plaintiff but by the second and third defendants who are the owners and the chargors thereof.

[*Editorial Note:* The defendants have appealed to the Supreme Court vide Civil Appeal No 02-199 of 1989.]

Cases referred to

1 *Standard Chartered Bank* v *Walker & Anor* [1982] 3 All ER 938 (distd)
2 *Development & Commercial Bank Bhd* v *Almas Motors Corporation (M) Sdn Bhd & Ors* [1988] 3 MLJ 229 (refd)

Legislation referred to

Contracts Act 1950 s 94
National Land Code 1965 ss 253 to 269
Rules of the High Court 1980 O 14 r 1

KY Chang (Miss) for the appellants/defendants.
WH Tang for the plaintiff/respondent.

Cur Adv Vult

Mokhtar Sidin JC: This is an appeal by the second, third, fourth, fifth and sixth defendants against the decision of the senior assistant registrar who had given judgment in favour of the plaintiff against them as well as the first defendant on the application by the plaintiff for summary judgment under O 14 r 1 of the Rules of the High Court 1980.

In the present appeal the plaintiff as banker had extended overdraft banking facilities to the first defendant, and these facilities, as is normal in banking practice, were secured by a first legal charge created over a piece of land ('the land') belonging to the second and third defendants, viz land held under HS (D) 24364 PT No 13718 mukim of Petaling. In addition to that charge which had been duly registered, by a guarantee in writing dated 17 October 1985, the second, third, fourth, fifth, sixth and seventh defendants agreed with the plaintiff to guarantee the due payment on demand to the plaintiff of all money and liabilities owing or incurred by the first defendant on any current or other account or in any manner whatsoever with interest thereon with daily rests up to the limit of $400,000. The plaintiff made demand on all the defendants for the repayment of the overdraft facilities given when the amount advanced including interest was approximately $360,000. On 4 April 1987 the second and third defendants, as chargors of the land, informed the plaintiff that they proposed to sell the land by private treaty at the price of $280,000 in order to repay part of the overdraft facilities advanced by the plaintiff and owing by the first defendant. The plaintiff agreed to the proposal and the sale was subsequently carried out and the sum of $280,000 (the proceeds of the sale) was paid to the plaintiff accordingly to reduce the overdraft account of the first defendant. The claim by the plaintiff by its amended statement of claim was reduced accordingly after taking into consideration the payment of $280,000. The senior assistant registrar gave judgment in favour of the plaintiff for the sum claimed in the amended statement of claim.

Being dissatisfied with the decision of the learned senior assistant registrar, the second, third, fourth, fifth and sixth defendants appealed to the judge in chambers. On the hearing of the appeal, it was contended on behalf of the defendants that the decision of the learned senior assistant registrar was wrong and should be set aside and the appeal allowed on the following grounds:

(a) firstly, the amount claimed and stated to be owing by the defendants to the plaintiff had not been proved at all either by the affidavit filed or by any certificate of indebtedness; and
(b) secondly, it was the contention of the fourth, fifth and sixth defendants that the plaintiff had failed to discharge the duty of care which it owed to them, ie the fourth, fifth and sixth defendants, to obtain the true market value of the land at the time when the plaintiff had agreed to the sale of the land by the chargors, ie the second and third defendants.

Let me deal first with the second ground. In support of this contention the defendants produced the valuation report prepared by Jurukon Hartanah Kuala Lumpur which concluded that the fair market value of the land is about $340,000. This conclusion is arrived at by way of comparison of the sale of similar property within the same locality in the mukim of Petaling as follows:

Date	Lot No	Consideration
14 August 1985	PT 13728	$317,900
16 June 1985	PT 13705	$290,000
8 August 1986	PT 13708	$305,000
23 December 1987	PT 13704	$280,000

After going through that evidence and considering it carefully, I am of the opinion that the sale of the land at the price of $280,000 reflects the fair, or substantially the fair, market value of the land at the material time. It is pertinent to point out that the sale of the land was not at the initiative of the plaintiff. The sale was done by the second and third defendants who are the owners and chargors. It was the second and third defendants who negotiated with the third party for the sale and purchase of the land by private treaty, as opposed to a sale by public auction under the provisions of ss 253 to 269 of the National Land Code 1965. Only after the conclusion of such negotiation that the second and third defendants requested the plaintiff to release the land and discharge the charge on payment of $280,000. The plaintiff acceded to this request. The second and third defendants as owners and chargors of the land did not complain about the sale. Learned counsel for the defendants cited the judgment of Lord Denning in the case of *Standard Chartered Bank* v *Walker & Anor*[1] at p 942 where the learned judge said:

... The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company (of which he is the agent) to clear off as much of its indebtedness to the bank as possible, but also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. It may be that the receiver can choose the time of sale within a considerable margin, but he should, I think, exercise a reasonable degree of care about it. *The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realization. If he does so, then it too is under a duty to use reasonable care towards the company and the guarantor.* (Emphasis mine)

With respect, I entirely agree with the statement of law in the above case which was cited with approval by VC George J in *Development & Commercial Bank Bhd* v *Almas Motors Corporation (M) Sdn Bhd & Ors.*[2] In my opinion, however, the *Standard Chartered Bank* case[1] does not assist the defendants for that case can be easily distinguished from the present case in that the second and third defendants are not the agents of the plaintiff. Furthermore, as emphasized, the plaintiff is not responsible for the act of the second and third defendants in the sale of the land; neither did the plaintiff give any direction or interfere with the act of those defendants. If at all the second and third defendants are treated to be agents, they are the agents for the other defendants. Thus the other defendants must take the responsibility of the acts of the second and third defendants. As such I am of the view that there is no merit in the contention of the defendants of this ground.

As to the first ground it was contended on behalf of the defendants that there were discrepancies in the affidavit of Ng Yin Hing affirmed on 7 December 1988. No figures were ever mentioned in that affidavit. The affidavit referred to the statement of claim which was subsequently amended to take into consideration the sum of $280,000 which was paid by the second and third defendants to the plaintiff. The amount due and pavable at the time of the hearing of the O 14 application before the learned senior assistant registrar was as stated in the affidavit of Lim Jian Hoo affirmed on 14 July 1987. The defendants failed to adduce any evidence to show that the amount stated is wrong in order to raise a triable issue. It is only the allegation of the defendants that the value of the land was more than $280,000 and thus the amount due and payable to the plaintiff should be much less. For the reasons I have stated above I am satisfied that the land was sold at $280,000 and this sum had been taken into account by the plaintiff.

In passing, learned counsel for the defendants submitted that s 94 of the Contracts Act 1950 to be applicable in this case. In my view s 94 is not applicable in this case for the simple reason that sale of the land was not carried out by the plaintiff but by the second and third defendants who are the owners and the chargors of the land.

Accordingly, I am of the view that there is no merit in the appeal of the second to sixth defendants and that they did not raise any triable issue. As such I dismiss this appeal with costs.

Appeal dismissed.

Solicitor: *Chye, Chow, Chung & Co; Arifin & Partners.*

Reported by *Wong Kim Fatt*

Perwira Habib Bank Malaysia Bhd v Syarikat Johor Tenggara Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO C23-2306-86
GUNN CHIT TUAN J
4 MAY 1989

Civil Procedure – Summary judgment against defendants – Guarantee – First defendant principal debtor – Other defendants guarantors – Principal debtor setting up counterclaim – Stay of execution – Whether judgment against guarantors ought to be stayed pending disposal of counterclaim

Contract – Guarantee – Judgment against principal debtor and guarantors – Principal debtor setting up counterclaim – No provision in guarantee for payment of debt free of set-off or counterclaim – Whether guarantors excused from payment pending disposal of counterclaim

The plaintiff, a commercial bank, obtained summary judgment against all the defendants for repayment of a debt. The first defendant was the principal debtor while the remaining defendants had stood guarantee for the repayment of the debt. The guarantors contended that execution of the judgment against them could be stayed pending the disposal of the principal debtor's counterclaim against the bank. The contract of guarantee did not provide that payment of the debt should be made free of any set-off or counterclaim.

Held, setting aside the stay of execution:
It was not contended by the defence that the amount for which summary judgment was granted was not due, and having considered that courts in this country hearing commercial cases ought to follow the trend of authorities in the appellate tribunals of other Commonwealth countries such as the United Kingdom and the Republic of Singapore and recognize business realities by taking notice of the commercial purpose of guarantees, the purport, utility and obvious intent of which are to ensure that creditors would be paid early by guarantors when the principal debtors are unable or unwilling to do so, no stay of the judgment against the guarantors shall be granted.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-91 of 1989.]